

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

**Lt. Commander KENNETH J. WHITWELL,
U.S. Navy,**

Plaintiff,

v.

**ARCHMERE ACADEMY, INC., a Delaware
corporation; CATHOLIC DIOCESE OF
WILMINGTON, INC., a Delaware corporation;
Rev. EDWARD SMITH, individually and in his
official capacity; and Rev. MICHAEL A.
SALTARELLI, in his official capacity,**

Defendants.

C.A.No.05-796-SLR

**PLAINTIFF'S SECOND RULE 55(b) MOTION FOR A DEFAULT JUDGMENT
AGAINST DEFENDANT SMITH AND FOR A TRIAL ON DAMAGES**

Pursuant to Fed.R.Civ.P. 55(b)(2), plaintiff Moves this Court to re-enter a default judgment against defendant Edward Smith and to schedule a hearing or trial on damages at a time convenient to this Honorable Court.

Facts

On November 17, 2005, Plaintiff filed his Complaint. (D.I. 1). Service on defendant Smith was achieved on January 3, 2006. (See D.I. 5). Under Fed.R.Civ.P. 12(a)(1)(A), Smith's Answer was due on January 23, 2006,

On January 16, 2006, undersigned counsel received a letter from Tom Burgstrum who indicated he was defendant Smith's personal attorney and that he had received a copy of the complaint from Smith and had reviewed it. (Exhibit A). Subsequently, Mr. Burgstrum

telephonically contacted undersigned counsel and upon request, a 30 day extension of time to Answer the Complaint was orally granted to Smith. Accordingly, Smith's Answer was due on February 23, 2006.

However, despite the granting of this extension and the passage of more than a year since service was executed, defendant Smith has failed to file either an Answer or any other responsive pleading.¹

On April 10, 2006, Plaintiff filed his Rule 55(a) Motion to the Clerk for an Entry of Default, as well as his Rule 55(b) Motion for a Default Judgment. (D.I. 10, 11). After the deputy clerk granted Plaintiff's Motion for an Entry of Default (D.I. 23), a default hearing was held on January 31, 2007 and a Default Judgment was entered against Smith. (D.I. 26). However, upon discovering non-material, inadvertent errors contained in the Return of Service for defendant Smith, Plaintiff immediately brought this to the attention of the Court and requested leave to file an amended Return of Service. (D.I.29). Plaintiff has since done so. (D.I. 30).

Discussion

As the docket and factual recitation set forth above makes clear, defendant Smith has failed to file an Answer. Nor has he filed a Motion to dismiss or otherwise challenged matters such as service, venue or the sufficiency of the Complaint.

Despite proper service, evidenced by both the executed return of service and by the fact that his attorney contacted counsel and stated Smith had given him a copy of the complaint following service, defendant Smith has failed to follow one of the most fundamental provisions of the Federal Rules of Civil Procedure - filing an answer to a complaint that was duly filed and

¹ Since mid-January of 2006, plaintiff has not been contacted by either Smith or any representative on his behalf.

served. And “[b]ecause defendant[] [Smith has] failed to answer, move or otherwise respond to the complaint, the entry of default judgment against [him] is appropriate.” Compendia Songs v. On Top Communications, 2004 WL 2898070, at *2 (D.Del. Nov. 15, 2004).

Defendant has failed to answer, move or otherwise respond to the Complaint. As a result, “the entry of default judgment against [him] is appropriate.” Id.²

Since liability under all three Counts of the Complaint has thus been established, pursuant to Fed.R.Civ.P. 55(b)(2), plaintiff respectfully requests that a hearing or trial be scheduled at which evidence can be presented to determine the amount of compensatory and punitive damages due to plaintiff.

Plaintiff waives an opening brief in support of this Motion.

Respectfully Submitted,

THE NEUBERGER FIRM, P.A.

/s/ Thomas S. Neuberger
THOMAS S. NEUBERGER, ESQ. (#243)
STEPHEN J. NEUBERGER, ESQ. (#4440)
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Dated: February 27, 2007

Attorneys for Plaintiff

² Contemporaneously with this Motion, plaintiff has filed a Second Rule 55(a) Motion to the Clerk to enter defendant’s default. See Limehouse v. Delaware, 2004 WL 502162, *1 (D.Del. March 3, 2004) (requiring the filing of such a motion). The Court’s default judgment will thus act upon this entry of default.

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Defendants.

C.A.No.05-796-SLR

ORDER

This _____ day of _____, 2007, it is hereby ORDERED
that a default judgment is entered against defendant Edward Smith in this action.

A hearing or trial on damages shall be held on _____, to determine the amount of compensatory and punitive damages due to plaintiff.

THE HONORABLE SUE L. ROBINSON, U.S.D.J.

CERTIFICATE OF SERVICE

I, Thomas S. Neuberger, being a member of the bar of this Court do hereby certify that on February 27, 2007, I electronically filed this **Pleading** with the Clerk of the Court using CM/ECF and that service upon defendant Smith is not required by the plain text of Fed.R.Civ.P. 5(a) which states, “[n]o service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them...” Since Plaintiff’s Motion does not add any new or additional claims, service is not required.

/s/ Thomas S. Neuberger
THOMAS S. NEUBERGER, ESQ.

Exhibit

A

THOMAS A. BERGSTROM**ATTORNEY AT LAW****100 DAVIS ROAD****MALVERN, PA 19355****(610) 251-9260****FAX (610) 251-0630**

January 16, 2006

VIA FAX 302-655-9329

Thomas S. Neuberger, Esq.

The Neuberger Firm

Two East Seventh St., Suite 302

Wilmington, Delaware 19801

Re: Reverend Edward Smith

Dear Mr. Neuberger:

I have received a copy of the complaint from Father Smith and have reviewed it. It may be that I will represent him in this matter, but do need to speak with you. I will touch base early this week.

Sincerely,



THOMAS A. BERGSTROM

TAB:ems